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No. 03-549

IN THE
Supreme Court of the United States

TOP RANK, INC.,

Petitioner,

v.

FLORIDA STATE BOXING COMMISSION, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the
District Court of Appeal of Florida, First District

BRIEF FOR THE SATELLITE BROADCASTING AND COMMUNICATIONS ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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The Satellite Broadcasting and Communications Association respectfully submits this brief as *amicus curiae* in support of the petition for a writ of certiorari to review the judgment of the District Court of Appeal of Florida, First District, in *Top Rank, Inc. v. Florida State Boxing Comm'n*, 837 So. 2d 496 (Fla. Dist. Ct. App. 2003), *petition for review denied*, 848 So. 2d 1157 (Fla. 2003) (table).

INTEREST OF AMICUS CURIAE SBCA[1]

The Satellite Broadcasting and Communications Association ("SBCA") is the national trade organization representing all segments of the satellite consumer services industry. In particular, the SBCA is committed to expanding the utilization of satellite technology for the delivery of Direct Broadcast Satellite, a multichannel video service that reaches millions of subscribers. The tax at issue in this case imposes a financial penalty on Direct Broadcast Satellite providers that offer viewers programming involving boxing, and ultimately penalizes viewers themselves based on the content of the programs they choose to watch.

STATEMENT

1. Over 21 million households in the United States currently subscribe to providers of Direct Broadcast Satellite (hereinafter "DBS providers" or "satellite broadcasters"). Unlike cable operators, who typically rely on a vast wired network to transmit programming into subscribers' houses, *see*

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[1] Petitioner and respondents have consented to the filing of this brief; their letters of consent are on file with the Clerk of the Court. Counsel for a party did not author this brief in whole or in part. No person or entity other than the *amicus curiae* and its members made a monetary contribution to the preparation or submission of this brief. Showtime Networks Inc., a respondent in this case, is a member of the SBCA.

Denver Area Educ. Telecommunications Consortium, Inc. v. FCC, 518 U.S. 727, 733 (1996); *FCC v. Beach Communications, Inc.* , 508 U.S. 307, 311 (1993), DBS providers transmit multichannel video service directly from a satellite to individual subscribers. DBS providers operate by re-transmitting content from various providers (such as ESPN, Home Box Office, and Showtime) to their satellites, which are positioned in geostationary orbit. The signals are received by the satellites and sent back to Earth instantly. Because the largest DBS providers deliver all of their primary programming from satellites whose signals cover the entire continental United States, the only requirement to become a DBS subscriber is to have a clear line of sight to the southern sky and the proper receiving equipment.

2. DBS providers distribute a wide range of programming. Subscribers can choose from over 200 channels, and they can pay an additional fee to view one-time "pay-per-view" events. The average DBS subscriber now spends over $70 per year on pay-per-view events, and pay-per-view audiences are substantial.[2] In 2002, for example, DBS providers received over $1.3 billion of revenue from pay-per-view programming; total pay-per-view revenue in 2002 (DBS and cable) was over $2.5 billion.

Subscribers can watch movies, music, sports, and other entertainment events on a pay-per-view basis. Broadcasts involving ring sports, such as boxing and wrestling, have long been the most popular pay-per-view programs. In 2002, ten pay-per-view programs including boxing matches together generated over $163 million of revenue; similarly, programs involving professional wrestling generated approximately $180 million of pay-per-view revenue in 2002. Indeed, in 2002, the two highest-grossing pay-per-view programs included boxing

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[2] Information about pay-per-view revenue is drawn from KAGAN WORLD MEDIA, THE STATE OF DBS 2002 (2002).

matches, and the top ten highest-grossing pay-per-view programs of all time all included boxing matches.

As explained in the petition, *see* Pet. at 4-6, pay-per-view telecasts involving boxing contain more than simply a live boxing match. The telecasts often are many hours long, with commentary, interviews, and other features. When a subscriber purchases a pay-per-view telecast involving boxing, he purchases (and is entitled to watch) the entire program – even when the featured boxing match takes up only minutes of a four-hour telecast.[3]

3. There are several steps in the distribution chain that brings pay-per-view programming to individual subscribers. DBS providers retransmit pay-per-view programs distributed by providers such as Showtime, which have contracted with the producer of the program (in this case, petitioner Top Rank) to obtain a license to telecast the program. Individual subscribers pay a fee to their DBS providers to receive the pay-per-view broadcast. The DBS provider retains some portion of the revenue from the telecast and, pursuant to a licensing agreement, passes on the remainder to the television distributor. The percentage that the agreement entitles the DBS provider to retain, of course, turns at least in part on the amount that the television distributor, pursuant to previously negotiated licensing agreements, passes on to the producer of the program. Accordingly, as a general matter, the higher the costs for the producer of the program, the lower the share for the television distributer and the DBS provider.

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[3] For example, the pay-per-view program that broadcast the January 16, 1999, boxing match between Mike Tyson and Frans Botha lasted four hours, including commentary and features, even though the match itself took only a fraction of that time. Pet. App. 33a. That telecast gave rise to the challenge in *Showtime Networks, Inc. v. Georgia State Boxing Comm'n*, No. 1999CV04184 (Ga. Super. Ct. Nov. 23, 1999), *reprinted at* Pet. App. 32a-41a, in which the court invalidated Georgia's tax on pay-per-view telecasts involving boxing.

4. There are currently over 1.1 million DBS subscribers in Florida. DBS providers nationally telecast the pay-per-view programs that gave rise to the State's tax assessment in this case. At the time of the filing of this brief, the precise number of DBS subscribers in Florida who watched some or all of the telecatss at issue here was not available. SBCA estimates, however, that over 160,000 DBS subscribers in Florida have watched a boxing pay-per-view program at some point.[4]

ARGUMENT

Florida's tax on telecasts of pay-per-view programs involving boxing imposes significant costs on satellite broadcasters – entities that this Court has recognized enjoy First Amendment protections as members of the media – based solely on the content of the programs they choose to telecast. The court below therefore erred in concluding that the tax does not violate the First Amendment. The decision below conflicts with decisions in three other jurisdictions that invalidated similar taxes. Florida, however, continues to enforce its tax, and the decision below has emboldened at least two other states to enforce similar taxes that they previously had assumed were unconstitutional.

Even if there were no conflict, moreover, Florida's decision would likely limit programming choices for viewers *outside of* Florida, because DBS providers transmit the identical programming to subscribers throughout the continental United States. If DBS providers choose not to offer pay-per-view telecasts involving boxing (or to offer fewer such telecasts) because of the costs that Florida's tax imposes on such

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[4] This estimate is based on industry statistics that show that nationwide, 14% of households with DBS have ordered pay-per-view programs involving boxing. *See* KAGAN WORLD MEDIA, THE STATE OF DBS 2002 (2002).

programming, then subscribers in *other* parts of the country – including those states where courts have invalidated taxes identical to Florida's – may suffer a corresponding decrease in available programming content. This Court's review is warranted.

I. FLORIDA'S TAX IMPOSES A CONTENT-BASED FINANCIAL PENALTY ON THE EDITORIAL CHOICES OF SATELLITE BROADCASTERS

Florida has singled out for unfavorable tax treatment the telecast of certain forms of entertainment based solely on the content of those telecasts. DBS providers – and ultimately the viewing public – bear the cost of the tax when they choose to telecast (or view) programs whose content triggers the tax. A content-based financial penalty on the editorial choices of DBS providers violates the First Amendment.

1. "[T]hrough original programming or by exercising editorial discretion over which stations or programs to include in its repertoire," satellite broadcasters, like cable operators, seek "to communicate messages on a wide variety of topics and in a wide variety of formats." *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 494 (1986). When satellite and cable technology were still in their infancy, this Court recognized that because television service providers exercise "a significant amount of editorial discretion regarding what their programming will include," *FCC v. Midwest Video Corp.*, 440 U.S. 689, 707 (1979), their enterprise "partakes of some of the aspects of speech and the communication of ideas as do the traditional enterprises of newspaper and book publishers, public speakers, and pamphleteers." *Preferred Communications*, 476 U.S. at 494. Since that time, the Court has made clear that because "[c]able television provides to its subscribers news, information, and entertainment," it "is engaged in 'speech' under the First Amendment, and is, in

much of its operation, part of the 'press.'" *Leathers v. Medlock*, 499 U.S. 439, 444 (1991); *accord Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 636 (1994).

Taxation of television broadcasts thus implicates the First Amendment. *Leathers*, 499 U.S. at 444. This Court's precedents "apply the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content." *Turner Broadcasting*, 512 U.S. at 642. A tax whose application depends on the content of the material broadcast can survive judicial scrutiny only if the State demonstrates that its regulation is necessary to serve a compelling state interest and is narrowly drawn to achieve that end. *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 231 (1987).

2.a. Florida's tax on telecasts involving boxing runs afoul of these principles. This case is not about Florida's power to tax receipts from live boxing matches that take place within its borders. Nor can the State contend that it enjoys the power to tax receipts from boxing matches that take place beyond its borders. *See Quill Corp. v. North Dakota*, 504 U.S. 298, 311 (1992); *Healy v. Beer Inst., Inc.*, 491 U.S. 324, 332 (1989); *Robbins v. Shelby County Taxing Dist.*, 120 U.S. 489, 498 (1887). This case accordingly cannot be resolved, as the court below suggested, by characterizing the tax as one on the "act of boxing," Pet. App. 12a, for the "act" here (whatever *its* entitlement to First Amendment protection, *cf. Barnes v. Glen Theatres, Inc.*, 501 U.S. 560, 566 (1991) (holding that nude dancing is "expressive conduct within the outer perimeters of the First Amendment"); *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61, 65 (1981) (invalidating ordinance prohibiting live entertainment)), occurred in another State. Florida's sole justification for imposing the tax challenged in this case is the connection between the State and the *telecast* of programs involving boxing that took place in another State.

As a Georgia court noted in invalidating a similar tax

statute, "[t]here is a distinction between the match itself and the telecast of the boxing event." *Showtime Networks,* Pet. App. 36a n.3. Such telecasts plainly constitute speech within the meaning of the First Amendment. First, those telecasts include commentary and other features that render them analogous to newspaper articles reporting on and analyzing boxing matches. *See TVKO v. Howland*, 15 Or. Tax 335, 345 (2001) ("The state's attempt to regulate the televising of a boxing match is no different than an attempt to regulate a radio broadcast or [Time Warner Entertainment's] *Time* Magazine because it carries photos of the boxing match."), *aff'd*, 73 P.3d 905 (Or. 2003). Indeed, it is difficult to distinguish any of the pay-per-view telecasts that gave rise to the tax in this case from a pay-per-view program that pairs a live boxing match with a documentary about boxing, or from a program that includes a live boxing match and a forum on whether boxing is too violent; and if that is true, it is difficult to see why the telecasts at issue in this case are meaningfully different from a pay-per-view telecast solely of the documentary or the forum – telecasts that clearly would constitute speech under the First Amendment. The difference is one of degree, not of kind.

Second, by "exercising editorial discretion over which stations or programs to include in its repertoire," DBS providers and cable operators "seek to communicate messages on a wide variety of topics and in a wide variety of formats." *Turner Broadcasting*, 512 U.S. at 636 (quoting *Preferred Communications*, 476 U.S. at 494). DBS providers' mere choice to offer viewers these telecasts, in other words, is protected by the First Amendment's protection of both speech and the press. *See Leathers*, 499 U.S. at 444.

Yet Florida does not impose a tax on other pay-per-view telecasts; pay-per-view programs involving professional wrestling, other sports, music, and movies do not give rise to a tax. The First Amendment, however, prohibits a State from imposing a tax on the telecast of a program based solely on the

content of the program. "As a general rule, laws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content based." *Turner Broadcasting*, 512 U.S. at 643. The selective imposition of a tax based on content – like the denial of an exemption from a tax because of one's views, *see Speiser v. Randall*, 357 U.S. 513, 518 (1958) – violates this general rule. *See Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 115 (1991) ("A statute is presumptively inconsistent with the First Amendment if it imposes a financial burden on speakers because of the content of their speech."); *Regan v. Taxation With Representation*, 461 U.S. 540, 545 (1983).

b. Florida's tax is functionally indistinguishable from the state tax invalidated in *Arkansas Writers' Project*. In that case, this Court held that a state sales tax that taxed general interest magazines but exempted (among others) religious, professional, trade, and sports journals violated the First Amendment. 481 U.S. at 223-224, 234. The petitioner's publication was subject to the tax because the articles it published did not uniformly concern subjects (such as religion and sports) that gave rise to the exemption. *Id.* at 230. To determine that the publication was subject to the tax, the State's enforcement authorities necessarily had to "examine the content of the message that is conveyed." *Ibid.* (*quoting FCC v. League of Women Voters of California*, 468 U.S. 364, 383 (1984)). "Such official scrutiny of the content of publications as the basis for imposing a tax is entirely incompatible with the First Amendment's guarantee of freedom of the press." 481 U.S. at 230.

Florida's tax suffers from the same constitutional defects. Although DBS providers and cable operators make available over 200 pay-per-view events each year – and countless more when one considers pay-per-view motion pictures – Florida taxes only those telecasts that include a boxing match. Just as Arkansas could not constitutionally impose a tax on a general-

interest magazine while exempting from the tax publications (such as *International Boxing Digest*) that included articles only about boxing, *see Arkansas Writers' Project*, 481 U.S. at 229-230, Florida cannot impose a tax only on pay-per-view telecasts involving boxing while exempting all other pay-per-view programs. Nor is Florida's tax saved from strict scrutiny simply because its application does not turn on the *particular* views expressed during the targeted pay-per-view telecasts; "the First Amendment means that government has no power to restrict expression because of its message, its ideas, its *subject matter*, or its content." *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95 (1972) (emphasis added); *accord Burson v. Freeman*, 504 U.S. 191, 197 (1992) ("[T]he First Amendment's hostility to content-based regulation extends not only to a restriction on a particular viewpoint, but also to a prohibition of public discussion of the entire topic.").

Of course, *Arkansas Writers' Project* involved print media, not television. But this Court has made clear that this is a distinction without a difference. Satellite broadcasters "engage in and transmit speech," and "they are entitled to the protection of the speech and press provisions of the First Amendment." *Turner Broadcasting*, 512 U.S. at 636; *accord Leathers*, 499 U.S. at 444; *Preferred Communications*, 476 U.S. at 494; *Midwest Video Corp.*, 440 U.S. at 707. Indeed, in deciding which pay-per-view programming to offer – or not to offer – a satellite broadcaster exercises editorial discretion, much as does the publisher of a magazine in deciding which articles to print. *See Preferred Communications*, 476 U.S. at 494 (stating that a cable television provider exercises "editorial discretion over which stations or programs to include in its repertoire"); *accord Denver Area Educ. Telecommunications Consortium*, 518 U.S. at 738 ("[T]he editorial function itself is an aspect of 'speech' . . . ."); *Midwest Video Corp.*, 440 U.S. at 707 (noting that cable operators must enjoy "journalistic freedom").

c. It is of no constitutional importance that the Florida

statute directly imposes the burden of paying the tax on the "promoter" of the boxing match included in the pay-per-view telecast. As explained in the petition, the "promoter" also functions as a producer of pay-per-view programming. Pet. at 15-16. More important, and contrary to the suggestion of the court below, *see* Pet. App. 9a-10a, DBS providers bear the cost of the tax at issue in this case. If Florida is permitted to continue to enforce the tax, petitioner in this case – and other producers of programs involving boxing – will demand in licensing agreements with television distributors a higher percentage of pay-per-view revenues to offset the cost of the tax; television distributors, in turn, will seek to pass on at least some of those costs to DBS providers (and cable operators) in distribution agreements; and DBS providers, unfortunately, might seek to pass some of the costs on to individual subscribers in the form of higher fees for pay-per-view programs. It is precisely for this reason that "[t]he government's power to impose content-based financial disincentives on speech surely does not vary with the identity of the speaker." *Simon & Schuster*, 502 U.S. at 117.

Alternatively, one entity in the chain of distribution might decide that it is relatively too costly to offer viewers programs involving boxing, choosing instead to offer other forms of pay-per-view entertainment – say, professional wrestling – that enjoy privileged status under Florida's tax code.[5] Under either

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[5] This, of course, assumes that Florida will not decide selectively to impose a tax on pay-per-view revenues from other pay-per-view programs – such as those involving professional wrestling – as well. After all, a professional wrestling event shares many characteristics with boxing: some of its appeal lies in its raw physicality (real or feigned), it takes place in a ring, and some social commentators have decried its content. And if (as the court below held) a State can impose a tax on telecasts including one form of entertainment, it is difficult to see why the State would be prohibited from selectively extending the tax to other telecasts involving similar forms of entertainment. Yet the First Amendment does not permit a State to tax

scenario, it is the viewing public that pays the ultimate First Amendment cost, either by having to pay more for programming that it deems entertaining and worthwhile or by having a more limited range of content available in this important medium.

This Court has made clear that the First Amendment prohibits the State from putting satellite providers, cable operators, and ultimately the viewing public to that choice. *See Simon & Schuster*, 502 U.S. at 116 ("In the context of financial regulation, . . . the government's ability to impose content-based burdens on speech raises the specter that the government may effectively drive certain ideas or viewpoints from the marketplace."). In *Simon & Schuster*, the Court invalidated New York's "Son of Sam" law because it "single[d] out income derived from expressive activity for a burden the State place[d] on no other income, and it [was] directed only at works with a specified content." *Ibid.* Florida's tax on boxing telecasts is equally flawed. As explained above, only pay-per-view telecasts that include boxing matches are covered by the challenged tax, and those telecasts themselves plainly are expressive activity. Ultimately, it does not matter whether the relevant "speaker" is considered to be the promoter, the television distributor, or the satellite (or cable) provider; Florida's tax "establishes a financial disincentive to create or publish" – through the medium of broadcast – "works with a particular content." *Id.* at 118.[6]

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telecasts based solely on the content of the telecasts. *See TVKO v. Howland*, 15 Or. Tax 335, 338 (2001)(invalidating Oregon tax statute whose only difference from the one at issue in this case was that it applied not only to telecasts involving boxing, but also to telecasts involving professional wrestling matches), *aff'd*, 73 P.3d 905 (Or. 2003).

[6] Florida now argues that this Court may not consider the application of the challenged tax to entities other than boxing promoters, because Florida law permitted petitioner, which Florida characterizes as a "promoter" under the statute, to bring only a facial challenge below. *See* Br.

II. THIS COURT SHOULD GRANT THE PETITION BECAUSE FLORIDA'S DECISION CONFLICTS WITH DECISIONS IN THREE OTHER JURISDICTIONS AND WILL AFFECT PROGRAMMING CHOICES FOR VIEWERS OUTSIDE OF FLORIDA

The decision of the Florida court is in direct conflict with the decisions of courts in California, Georgia, and Oregon. The petition and the brief of respondent Showtime Networks Inc. make clear why the Court should grant certiorari in this case to resolve the conflict. In addition to the reasons stated therein, this Court should grant the petition because of the particular burden that the conflict imposes on DBS providers, and derivatively on their subscribers.

Unlike cable television systems, which "deliver[] video programming to a large community of subscribers through coaxial cables laid under city streets or along utility lines," *Beach Communications*, 508 U.S. at 311, DBS providers do not rely in the transmission of their programming on any physical infrastructure (other than the subscriber's satellite receiving

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Opp. at 6-9. This argument is meritless, for two reasons. First, the provision of the statutory scheme at issue here – which applies the tax to telecasts of boxing matches that take place outside of Florida, *see* Fla. Admin. Code Ann. R. 61K1-1.042(4), *reprinted in* Pet. App. 29a-30a – *is* facially invalid, because it "establishes a financial disincentive to create or publish works with a particular content," *Simon & Schuster*, 502 U.S. at 118, regardless of whether the obligation to pay the tax falls directly on the promoter, the television distributor, or the satellite (or cable) provider. Second and in any event, the court below squarely considered the constitutionality of the tax *as applied* to telecasts of boxing matches. *See* Pet. App. 12a-15a (holding that tax does not violate First Amendment because "the act of boxing does not involve either pure or symbolic speech"). That decision therefore is now properly before this Court.

dish) in the subscriber's State. Instead, DBS providers re-transmit programming from various providers to their satellites, which instantly transmit the programs to subscribers. As a result, a DBS subscriber in Miami receives the identical transmission as a subscriber who has elected the same package and level of service in Los Angeles.

DBS providers thus are not "present" in any meaningful sense in the jurisdictions where their subscribers receive service. Accordingly, variations among the States in their regulation of satellite television broadcasts impose uniquely large administrative burdens on DBS providers.[7] The decision below – which made Florida the first jurisdiction to uphold a tax on telecasts of pay-per-view broadcasts – means that the identical transmission gives rise to differing obligations, depending on the jurisdiction of the subscriber.

More important, for the same reason, the decision in Florida likely will affect not only the programming available to subscribers in Florida, but also the choices available to DBS subscribers around the country. As explained above, Florida's tax might lead DBS providers to cease offering the types of telecasts that give rise to the tax. But because of the nature of satellite television – which enables the identical transmission to reach subscribers thousands of miles apart – a decision not to offer telecasts of a particular content in *one* State might means a decision not to offer those telecasts *at all* – even to subscribers who live in States, such as California, Georgia, and Oregon, where courts have found taxes identical to Florida's unconstitutional. *See United States Satellite Broad. Co. v. Lynch*, 41 F. Supp. 2d 1113 (E.D. Ca. 1999); *Showtime*

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[7] Indeed, Congress recognized this unique burden and sought to alleviate it in section 602 of the Telecommunications Act of 1996, Pub. L. No. 104-104, Title VI, § 602, 110 Stat. 104 (exempting providers of "direct-to-home satellite" television from taxes imposed by "local taxing jurisdictions").

Networks, Inc. v. Georgia State Boxing Comm'n, No. 1999CV04184 (Ga. Super. Ct. Nov. 23, 1999), *reprinted at* Pet. App. 32a-41a; *TVKO v. Howland*, 15 Or. Tax 335, 345 (2001), *aff'd*, 73 P.3d 905 (Or. 2003). The Florida statute upheld by the court below thus applies extra-territorially not only in the sense that it purports to tax activity (i.e., live boxing matches) that takes place elsewhere, but also, as a practical matter, because it is likely to force editorial decisions by DBS providers that affect subscribers in every other State. It violates the First Amendment rights of viewers and those trying to reach them, not just in Florida but throughout the nation.

CONCLUSION

For the reasons stated, the Court should grant the petition for a writ of certiorari.

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